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Supreme Court of the United States.

OCTOBER TERM, 1956.

SAMUEL CABOT, DOROTHY B. HALL, MARGARET P. HERRICK, ELIZABETH H. JACKSON, ELIZABETH S. PARKER, HENRY PARKMAN, GEORGE A. PARSON, CHARLES O. PENGRA, HENRY L. SHATTUCK, CONSTANCE J. WHITING, CHARLES STREET GARAGE COMPANY, INC., ELIOT STREET GARAGE COMPANY, AND BRIMMER STREET GARAGE CORPORATION, *Appellants,*

v.

JAMES H. ALPHEN, JOHN J. CHAPMAN, AND LAWRENCE J. MOORE, AS THEY ARE MEMBERS OF THE BOARD OF ASSESSORS OF THE CITY OF BOSTON, THE CITY OF BOSTON, AND BOSTON COMMON GARAGE, INC., *Appellees.*

JURISDICTIONAL STATEMENT.

Appellants appeal from the final decree after rescript of the Superior Court of the Commonwealth of Massachusetts, sitting within Suffolk County, entered on December 11, 1956, ordering certain declarations and determinations,

following receipt of rescript from the Supreme Judicial Court of Massachusetts on November 28, 1956. Appellants submit this statement pursuant to the requirement of Rule 15 of this Honourable Court to show that the Supreme Court of the United States has jurisdiction of the appeal and that the federal question presented is substantial.

Opinion Below.

The only opinion below, that of the Supreme Judicial Court, is reported in Mass. Adv. Sh. (1956) 1299, and unofficially in 138 N.E. 2d 618. Copies of the opinion and the final decree after rescript are attached hereto as Appendix A.

Jurisdiction.

This suit was brought under Mass. G.L. (Ter. Ed.) c. 40, § 53, and pursuant to Mass. G.L. (Ter. Ed.) c. 231A, § 6, to determine the validity or invalidity of a Massachusetts statute on the ground, *inter alia*, of its being repugnant to the equal protection clause of Article XIV of the Amendments to the Constitution of the United States. Following receipt of rescript from the Supreme Judicial Court on November 28, 1956, the final decree after rescript sustaining the validity of the statute was entered by the Superior Court on December 11, 1956, and notice of appeal was filed in the Superior Court on February 18, 1957. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, § 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the decree in this case on appeal: *Hartford Steam Boiler Inspection & Insurance*

Co. v. *Harrison*, 301 U.S. 459; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94.

Question Presented

The question presented is whether a tax exemption purportedly granted by a Massachusetts statute to a single private business corporation is invalid as a denial to other taxpayers within the jurisdiction, including the owners of competing businesses, of the equal protection of the laws, contrary to the prohibition of the Fourteenth Amendment of the Constitution of the United States.

Statute Involved.

Mass. St. 1946, c. 294, as amended by Mass. St. 1948, c. 654, Mass. St. 1951, c. 355, and Mass. St. 1955, c. 529, is set forth in Appendix B hereto.

Statement.

The appellee City of Boston owns the fee (subject to easements in the public for park purposes) to Boston Common, situated in the middle of the city. By Mass. St. 1946, c. 294, it was authorized to lease to a private corporation to be chosen by it a portion of the Common on which the private corporation should construct and operate an underground garage for motor vehicles. Massachusetts statutes of general application provide for the taxation of such leasehold property as a fee interest (G.L. (Ter. Ed.) c. 59, § 3A; St. 1922, c. 390, § 1). The 1946 statute was amended by St. 1948, c. 654, which inserted in it a new sec-

tion 2A providing that "No private corporation mentioned herein shall be assessed any tax upon any real estate . . . of which it is lessee hereunder . . . while such lease is in force, the provisions of any general or special law to the contrary notwithstanding."

In 1955 the City entered into a lease to the appellee Boston Common Garage, Inc., of a part of the Common. Boston Common Garage, Inc., is a private business corporation operated for profit. Under its then corporate name of Motor Park, Inc., it was one of the respondents in *Lowell* v. *Boston*, 322 Mass. 709, 711; appeal dismissed 335 U.S. 849. The lease contains the following provision:

> "The Lessee shall pay all taxes, ordinary as well as extraordinary, of every kind, that may be lawfully and validly assessed as of any date during the term of this lease, whether against the demised premises or against the Lessee with respect to the demised premises . . ."

Instructed by the provisions of section 2A quoted above the appellee Assessors of the City do not propose to assess any taxes to the appellee Garage upon the demised real estate.

Appellants are ten taxable individuals who are inhabitants of Boston and three corporations who own and operate garages in Boston upon which they pay taxes and which are located within 2000 feet of the main entrance of the projected garage and which will be subjected to competition by appellee Garage, Inc.

Appellants brought this suit in the Superior Court of the Commonwealth of Massachusetts, sitting in Suffolk County, under Mass. G.L. (Ter. Ed.) c. 40, § 53, to restrain the Assessors from assessing taxes on property in Boston without likewise assessing taxes on the property of appel-

lee Garage, Inc., and to obtain declarations (1) that the City cannot constitutionally raise money by taxing property in the city unless such taxes are likewise assessed to Garage, Inc., upon the property demised to it, and (2) that the tax exemption purportedly granted by section 2A of Mass. St. 1946, c. 294, as inserted by Mass. St. 1948, c. 654, is invalid and not binding upon the Assessors. In their petition appellants specifically alleged: "Said purported tax exemption is invalid as a discrimination, in favour of . . . Garage and against your orators and others similarly situated, amounting to a denial of the equal protection of the laws guaranteed by Article XIV of the Amendments to the Constitution of the United States." Demurrers were filed by the City, the Assessors, and Garage, Inc., on the assigned ground that said section 2A was constitutional and valid. These demurrers were sustained without opinion and a final decree entered dismissing the petition.

On appeal, seasonably taken to the Supreme Judicial Court of Massachusetts, the question of the validity of said section 2A under the Constitution of the United States was thus directly presented. The Supreme Judicial Court held the challenged statute valid under the Constitution of the United States upon the theory that the grant of exemption to Garage, Inc., alone so long as it held the lease in question amounted to a permissible "classification" of the garage to be built and operated by Garage, Inc., for purposes of taxation, and ordered a decree declaring (1) that the petitioners are not, and none of them is, entitled to any affirmative or injunctive relief, and (2) "that, as made applicable to Garage, Inc., and its property, and, as affecting the property taxation of the petitioners, and each of them, and of their property, by the city of Boston, St. 1946, c. 294, § 2A, inserted by St. 1948, c. 654, §1, . . . does not deprive the petitioners, or any

one or more of them, of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States." The final decree after rescript made the aforesaid declarations, including the declaration that as to the petitioners-appellants the statute was valid under the Constitution of the United States.

The Federal Question is Substantial.

The substantial federal question which is presented by this appeal is whether it is permissible for a state court to sustain the validity of a tax exemption granted to a single corporation by the expedient of calling it a classification of taxpayers.

Granting that it is permissible for a state to divide its taxpayers into a very great number of classes and apply different forms or rates of tax to each class and exempt certain of the classes from all taxation, still the constitutional requirement of equal treatment of taxpayers similarly circumstanced remains. Capricious distinctions are not possible within a validly established class. Substantial equality in treatment is required. A fair example is to be found in the cases requiring that, where there is systematic undervaluation of property for purposes of taxation, individual taxpayers within the classification cannot be required to pay on a basis of full valuation.

> *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U.S. 23.
>
> *Concordia Fire Insurance Co.* v. *Illinois,* 292 U.S. 535.

Unless the Massachusetts Court was correct in its determination that this particular statute not only granted

a personal exemption but likewise constituted a proper classification of taxpayers so that the appellee Garage would fall in one class and the appellants in another and distinct one, it is clear that the appellants have been denied equal protection.

This Court defined the word "classification" in its opinion in *Billings* v. *Illinois*, 188 U.S. 97, where it said (at page 102) that classification is the "grouping of things in speculation or practice, because they 'agree with one another in certain particulars and differ from other things in those same particulars.'" It was further pointed out that, when a legislature classifies, a permissible classification must be made with relation to the legislative purpose. The Court said (at pages 102, 103): "If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose, (excludes no persons or objects that are affected by the purpose, includes all that are,) logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation." This necessarily presupposes an external standard by which membership in a given class is to be determined. It is true that it may perfectly well be that at any given moment there will be but one individual who in point of fact would qualify for membership in the class by the operation of the external standard, but there must still be an external standard which would bring into the class any later comers who measured to it. There is no external standard provided by the statute here under consideration.

There was some slight attempt made in the statute to make it sound like one of general application through the use of the words "No private corporation mentioned herein," but that is the precise equivalent of a statement that the Boston Common Garage, Inc., should be exempted from taxation. Throughout the statute as originally passed, all references are to a single private corporation with whom

the lease and construction contract was to be made. A subsequent amendment which inserted a new section 2C (St. 1951, c. 355) confirms this by its reference to "the private corporation mentioned herein." It is to be observed that the language does not constitute a provision that the land demised by the lease shall not be subjected to tax, but that the particular single private corporation shall not be taxed by reason of holding the land. If it should assign the lease to another, whether an individual or a corporation, the assignee would be fully taxable. This is no classification at all, but clear special legislation invalid under the equal protection clause.

Hartford Steam Boiler Inspection & Insurance Co. v. *Harrison*, 301 U.S. 459.

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495.

Louisville Gas & Electric Co. v. *Coleman*, 277 U.S. 32.

McFarland v. *American Sugar Refining Co.*, 241 U.S. 78.

Even if it were possible as a matter of logic to say that a class consisting only of the single private corporation was created, still that is an unreasonable classification, since it is not properly related to the legislative purpose. The legislative purpose presumably was the relief of traffic congestion through the provision of garage space. The contemplated garage and the existing garages owned by the corporate appellants would serve precisely the same area, and each would contribute in the same fashion to the relief of the congestion, yet the appellants are excluded from the exemption which is granted to their competitor. This is directly contrary to the definition of permissible classification quoted above from *Billings* v. *Illinois*, 188

U.S. 97. That sort of discrimination is invalid as arbitrary beyond possible justice.

McFarland v. *American Sugar Refining Co.*, 241 U.S. 78.
Wheeling Steel Corp. v. *Glander*, 337 U.S. 562.

The reasoning of the Massachusetts Court on the federal point was very sketchy indeed. After an *ipse dixit* statement that there was no denial of equal protection, the Court proceeded: "The tax exemption here granted by the Legislature is with respect to property owned by the city of Boston and used for a public purpose as expressly authorized by the Legislature." This simply is not so. The *property as such* is not exempted from taxation. The *corporation* is not to be taxed upon the property while it holds it subject to the lease. The minute the garage and the lease passed to an assignee—and the lease was fully assignable—or to a mortgagee in possession, all exemption would vanish.

Having thus incorrectly stated the terms of the statute, the opinion goes on to say that, since a tax-free property would be worth more to a prospective lessee than one on which the lessee would have to pay taxes, the City as lessor might be expected to obtain a higher rent and so the municipal treasury would have as much money paid into it as if a lower rent plus taxes were received. Passing the question of whether a back-door recoupment could ever cure a denial of equal protection, this constitutes a complete assumption without any support in the record. St. 1946, c. 294, set a minimum rental: "The lessee shall pay for the use of the rented premises a rental equivalent to not less than two per cent of its gross receipts." St. 1948, c. 654, which brought in the exemption, did not increase this minimum; so that there seems little ground upon which to

make any assumption that the legislature had any such thought in mind. There is absolutely nothing in the record—the case was decided on demurrer—on which to assume that the rental exceeded the minimum which had been fixed before an exemption had been suggested. Finally, the inclusion in the lease of the tax clause requiring the lessee to pay any taxes shows clearly that the parties did not regard rent as a substitute for taxes but regarded taxes and rent as entirely distinct matters.

Next the Court states an undoubted proposition of law: "Separate classification for taxation or exemption of property used for a public purpose is within the legislative discretion and does not constitute an unconstitutional discrimination," to support which it quotes from *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495. But that does not advance the question of whether there was in fact any classification. That point is never discussed at all. The most that is said is: "There is no showing on this record that there has been any improper classification of this garage for separate treatment in the matter of taxation. There is no suggestion that the Commonwealth permits taxation of any comparable garage property owned by the city and leased for a public purpose." Of course there was no showing that there had "been any improper classification of this garage for separate treatment," for there had been no classification at all. The statement that there is no suggestion that there is comparable garage property held as this is which is taxed assumes without the slightest justification that there are such garages similarly held. Even if there were, they would not qualify for the exemption granted by St. 1948, c. 654, as a member of the "class" there created for that "class" was limited by the statute to one certain corporation. The "class" could not open to admit another member. It was a jealously exclusive "class." Its uniqueness is not within the approval

of *Independent Warehouses, Inc.*, v. *Scheele*, 331 U.S. 70, cited to support the statute. The class there in question was open to new comers and so was a true class. Only where the classification can apply to others, which in the case at bar it cannot, can it escape condemnation as special legislation.

Provident Life & Trust Co. v. *McCaughn*, 245 Pa. 370, 375.

There can be no escape from the fact that the statute here in question did not, and did not purport to, establish any genuine classification at all. All it did was to award a plum to the appellee Garage. If that can be done without violation of the equal protection clause, it should be established by this Court. We say it cannot be done, and we urge that the question is one worthy of the consideration of this Court.

Respectfully submitted,

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Appendix A.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

SAMUEL CABOT & others *vs.* ASSESSORS OF BOSTON & others.

Suffolk. October 4, 1956. — November 28, 1956.

Present: WILKINS, C.J., RONAN, SPALDING, WILLIAMS, & CUTTER, JJ.

Boston Common. Taxation, Real estate tax: exemption. *Municipal Corporations,* Use of municipal property. *Constitutional Law,* Taxation, Equal protection of laws. *Declaratory Judgment. Equity Jurisdiction,* Declaratory relief, Taxable inhabitants' suit. *Equity Pleading and Practice,* Parties, Declaratory proceeding, Bill, Demurrer. *Words,* "Inhabitant."

Suit in equity heard in the Superior Court by *Cahill,* J., on demurrers.

CUTTER, J. Ten taxpayers of Boston and three garage corporations, doing business in Boston and paying taxes on their property there, have brought this petition under G. L. (Ter. Ed.) c. 40, § 53, purporting also to seek relief under G. L. (Ter. Ed.) c. 231A, § 6, against the city, its three assessors and Boston Common Garage, Inc., a private corporation (hereinafter called Garage, Inc.). Garage, Inc., is the lessee of a portion of Boston Common, to be used for garage purposes, under a lease made pursuant to St. 1946, c. 294, as amended by St. 1948, c. 654, St. 1951, c. 355, and St. 1955, c. 529.

The petition seeks to restrain the assessors from assessing taxes on property in Boston for the year 1956 without likewise assessing taxes for that year upon the portion of Boston Common leased to Garage, Inc. It also seeks declarations (1) that the city cannot constitutionally raise money by taxing property within the city unless taxes are assessed to

Garage, Inc., with respect to the leased portion of Boston Common, and (2) that, notwithstanding an express exemption found in St. 1946, c. 294, § 2A, inserted by St. 1948, c. 654, § 1, the assessors are under a duty to assess a tax to Garage, Inc., with respect to the leased premises.

Demurrers to the petition, filed by the city, the assessors and Garage, Inc., were sustained and a final decree dismissing the petition was entered. Appeals were taken by the petitioners. The facts set forth below are alleged in the petition.

Statute 1946, c. 294, § 2, authorized the city "to enter into a contract with a private corporation for the construction and operation, at the expense of the corporation and without cost to the city, of a garage for motor vehicles under Boston Common . . . together with all necessary and convenient approaches above and below ground; . . . and of an underground passageway from said garage with entrance and exit at or near the corner of West and Tremont streets . . . and to grant a lease for such purposes to such corporation for a term of not exceeding forty years . . . ." The city by § 2 is also authorized to permit construction of a two lane traffic tunnel under the Public Garden, Charles Street and the Common from Commonwealth Avenue at or near Arlington Street to the proposed garage. The lessee, by the statute, is to pay a rental equivalent to not less than two per cent of its gross receipts.

The city owns Boston Common in fee. *Lowell* v. *Boston*, 322 Mass. 709, 741, appeal dismissed sub nomine *Pierce* v. *Boston*, 335 U. S. 849. By a lease dated November 3, 1955, it leased to Garage, Inc., for business purposes, for a term of forty years beginning on that date, so much of Boston Common as was to be actually occupied by a garage under a part of Boston Common, including the approaches, an underground passageway and certain appurtenances, all as set out in attached plans. Garage, Inc., agreed to build the garage

in accordance with the plans and was given permission to construct the approaches from Commonwealth Avenue, mentioned above. The lessee, by the lease, was required to pay all taxes validly assessed as of any date during the term "against the demised premises or against the lessee with respect to the demised premises."

The corporate petitioners [1] each own in fee, and operate, a garage within 2,000 feet of the entrance of the projected garage and will be subjected to competition by Garage, Inc. Statute 1946, c. 294, does not authorize the city to control rates to be charged or otherwise to regulate the operation of the proposed garage and the city intends to refrain from such control or regulation.

Statute 1948, c. 654, § 1, inserted in St. 1946, c. 294, a new section, § 2A, reading, "No private corporation mentioned herein shall be assessed any tax upon any real estate, garage, underground passageway or traffic tunnel of which it is lessee hereunder or upon any structures or facilities constructed under any construction contract or lease while such lease is in force, the provisions of any general or special law to the contrary notwithstanding."

The respondents other than Garage, Inc., contend that § 2A merely expressly confirms an exemption of city owned

[1] The applicable statute does not purport to give these corporate petitioners standing to bring a ten taxpayers' proceeding. Under G. L. (Ter. Ed.) c. 40, § 53, such a proceeding must be brought by "ten taxable inhabitants." The word "inhabitant" normally would mean a natural person and in practical operation the statute seems to have been so construed. See G. L. (Ter. Ed.) c. 4, § 7, Fourteenth. Compare *Opinion of the Justices*, 122 Mass. 594, 596-598; *Glass* v. *Glass*, 260 Mass. 562, 565, and cases there cited. General Laws (Ter. Ed.) c. 40, § 53; creates a remedy which would not otherwise exist and those proceeding under it must come squarely within its terms. See *Fuller* v. *Trustees of Deerfield Academy*, 252 Mass. 258, 259-260; *MacDonald* v. *Street Commissioners of Boston*, 268 Mass. 288, 290, 297-298; *Povey* v. *School Committee of Medford*, 333 Mass. 70, 71-72 (Mass. Adv. Sh. [1955] 815, 816). Compare *Pilgrim Real Estate, Inc.* v. *Superintendent of Police of Boston*, 330 Mass. 250.

land, leased for public purposes, which would exist even without the enactment of § 2A and that, in any event, § 2A is valid. The petitioners assert that the operation of the proposed garage is in the nature of a private business and does not constitute a public use or a public purpose. Accordingly, they contend that § 2A grants a tax exemption, which (1) violates the provision relating to "proportional and reasonable . . . taxes" of Part II, c. 1, § 1, art. 4, of the Constitution of Massachusetts; and (2) denies the petitioners and others similarly situated the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.[1]

The assessors do not propose to make any assessment in 1956 to Garage, Inc., with respect to the leased property. They do, however, propose to assess the individual and corporate petitioners 1956 taxes with respect to their taxable property in Boston.

The petitioners assert that an actual controversy exists between the petitioners and the several respondents with respect to the duties of the latter under § 2A and with respect to the validity of § 2A.

No procedural questions are raised as grounds of demurrer. A ten taxpayers' suit may be brought, under G. L. (Ter. Ed.) c. 40, § 53, to restrain a tax levy, alleged to be generally invalid. *Dowling* v. *Assessors of Boston*, 268 Mass. 480, 483-486. See *Newhall* v. *Assessors of Brookline*, 329 Mass. 100, 102. However, in addition to seeking injunctive relief under G. L. (Ter. Ed.) c. 40, § 53, this petition also prays for declaratory relief under G. L. (Ter. Ed.) c. 231A, § 6 (inserted by St. 1945, c. 582, § 1). We think, however, that the petitioners have no standing entitling them to ob-

[1] The Attorney General has been given due notice of the pendency of this petition (where the constitutional validity of §2A is raised) as required by the last sentence of G. L. (Ter. Ed.) c. 231A, § 8, inserted by St. 1945, c. 582, § 1.

tain declaratory relief independently and apart from their statutory standing to seek injunctive relief under G. L. (Ter. Ed.) c. 40, § 53. See *Povey* v. *School Committee of Medford*, 333 Mass. 70, 71-72;[1] *Berry* v. *Quincy*, 334 Mass. ——.[2] Any declaratory relief granted under G. L.) Ter. Ed.) c. 231A, § 6, in this proceeding is not a matter of right and is wholly dependent upon whatever right to injunctive relief may exist under G. L. (Ter. Ed.) c. 40, § 53. Since the petition does not state an independent basis which, standing alone, permits declaratory relief to these petitioners, we need consider, in passing upon the issues raised by the demurrers, only the question whether a case for injunctive relief under G. L. (Ter. Ed.) c. 40, § 53, is stated by the petition. If no basis for such injunctive relief is stated in the petition, there was no error in sustaining the demurrers. However, a decision in the ten taxpayers' proceeding necessarily involves a determination of the issues on which a binding determination is sought, so, as a matter of discretion and to avoid possible future litigation, our decision affords the determination sought by the petitioners.

The petition alleges that the "operation of the said garage is in the nature of a private business, and does not constitute a public use or a public purpose" and that the lease to Garage, Inc., was made "for business purposes." These allegations we view as conclusions not admitted by the demurrers. *United Shoe Machinery Corp.* v. *Gale Shoe Manuf. Co.* 314 Mass. 142, 145, 160. *Burnes* v. *Metropolitan District Commission*, 325 Mass. 731, 733-734. We have considered them as asserting, in substance, merely that a lease of the type described in the petition was made for the purposes contemplated by the authorizing statute, regarding the petitioners' characterization of these purposes as a conclusion of law.

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[1] Mass. Adv. Sh. (1955) 815, 816-817.

[2] Mass. Adv. Sh. (1956) 649.

The lease to Garage, Inc., however, plainly does have a "double aspect." See *Allydonn Realty Corp.* v. *Holyoke Housing Authority,* 304 Mass. 288, 292. From the standpoint of Garage, Inc., the lease is for its business use, in an attempt to make a profit. The petitioners, accordingly, contend that the leased property should be taxed because it is to be used by a private corporation for its own profit. However, from the standpoint of the city, the primary and only objective of the lease is to accomplish the public purpose set out in the legislation, namely, the abatement of the public nuisance, consisting of congestion of the public ways of Boston, caused by the great number of motor vehicles. See St. 1946, c. 294, § 1. The effect of the legislative declaration of this purpose has been fully discussed in *Lowell* v. *Boston,* 322 Mass. 709, 735-738. It was there decided that the conditions which gave rise to the 1946 statute and its public purpose justified the scheme adopted by the Legislature to accomplish that purpose. Apart from this primary purpose, it is plain that the lease would not have been undertaken. As was said in *Lowell* v. *Boston* (at page 737) the "garage is an incident in a legislative plan designed to abate a public nuisance . . . a method employed to accomplish the primary purpose of the statute."

The question of the validity of the tax exemption granted by § 2A of the garage legislation, however, was not determined by *Lowell* v. *Boston.* That case was decided several weeks before the enactment (or introduction as a bill) of St. 1948, c. 654, which inserted § 2A in the 1946 statute. The intimation in the *Lowell* case (at page 734) that "the taxation of the garage is a matter for the General Court, and the occupant of commercial property located on land . . . held by the city in trust may be made liable for the tax" did not purport to deal finally with the question of tax exemption and, of course, could not have dealt with the exemption granted by the 1948 statute later enacted. Accord-

ingly, we have for consideration, without any binding prior decision on the precise issue, the case of city property leased for a public purpose, where the Legislature, as an incident of its plan for accomplishing that purpose, has made explicit statutory provision that the property so leased shall be exempt from taxation.

issue here

Apart from specific statutory provisions, no taxes are imposed in Massachusetts upon municipally owned property used for public purposes. *Rossire* v. *Boston*, 4 Allen, 57, 59. See *Burr* v. *Boston*, 208 Mass. 537, 541-542, 544. The exemption extends to privately owned corporations within the limits stated below. In *Connecticut Valley Street Railway* v. *Northampton*, 213 Mass. 54, this court said (at page 56), "Generally speaking, property owned by the government, whether the ownership be in State, county, city or town, and exclusively used for public purposes, is presumed to be exempt from taxation. And this is so, even when the property is situated in another municipality within the State than the owner.[1] Nothing but the clearly expressed will of the law-making power to the contrary will overcome this presumption"; (at page 57), "early it was determined that certain real estate owned by public service corporations and exclusively devoted to public use was exempt from local taxation"; and (at page 58), "Only such land is exempt as the corporation has taken by right of eminent domain, or, having the right so to take, has purchased. In other words, this right of exemption from taxation is coextensive with the right to take by eminent domain. . . . This exemption is not founded upon any express language of the tax acts, but upon judicial construction of them as dictated by considerations of justice and expediency."

[1] See on this point *Wayland* v. *County Commissioners of Middlesex*, 4 Gray, 500, 501; *Collector of Taxes of Milton* v. *Boston*, 278 Mass. 274, 277; *Assessors of Quincy* v. *Cunningham Foundation*, 305 Mass. 411, 417.

Reasonable exemptions, both of public property and of the real estate used for public purposes, held by privately owned corporations, are not precluded by Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth requiring that taxes on property must be "proportional and reasonable" nor by the more general provisions of art. 10 of the Declaration of Rights. See *Assessors of Quincy* v. *Cunningham Foundation*, 305 Mass. 411, 416-417, which (at page 418) recognized the validity, not only of these implied exemptions but also of further reasonable exemption of property used for public purposes when such exemptions are expressly granted by statute, as in § 2A inserted by the 1948 statute considered in the present case. All such statutory exemptions fall within the first category of exemptions described in *Opinion of the Justices*, 324 Mass. 724, at page 731, namely, "of property belonging to the public or devoted to uses of a public, quasi public, or patriotic nature or to . . . charitable . . . enterprises which tend in some measure directly or indirectly to relieve public burdens."

With respect to public property, the Legislature has broad authority to make it taxable in whole or in part if it desires to do so. *Boston Fish Market Corp.* v. *Boston*, 224 Mass. 31. In that case, this court considered whether certain flats in South Boston owned by the Commonwealth were taxable. Under St. 1909, c. 490, Part I, § 12,[1] these flats would be subject to taxation "if leased for business purposes." A lessee built market buildings upon these flats and leased them to dealers in fish and sea foods. It was contended that, because other similar flats (owned by the Commonwealth and leased by it to others) were not subject to taxation, the requirement of § 12 that the particular South Boston flats be subject to taxation was "in conflict

[1] Now found in substance in G. L. (Ter. Ed.) c. 59, § 5, Second, as amended by St. 1951, c. 667, § 2.

with the requirement that all property taxes must be 'proportional and reasonable' " (page 34). As to this, after holding the lease to be one for business purposes, the court (per Rugg, C.J.) said at pages 34-35, "The sovereignty, being the owner of its property, has a right to do with it as it will with regard to subjecting it to taxation. While property held for a public use need not be made subject to taxation in order to render taxation of the people's proportional and equal, if some property so held is made liable to taxation while other such property is not, no constitutional right of the citizen is infringed. The statute, in so far as it requires taxation of some of the property of the Commonwealth leased for purposes of general business, tends toward a closer approximation to equality of taxation than if all were freed from such imposts. It is not an arbitrary and capricious subjection of some private property and exclusion of other such property from the burdens of taxation. It is a dealing by the sovereign with some of its own property in such way as to lighten to that extent the general weight of taxation. The fact that some lessees of land of the Commonwealth, or some occupants of land of the Commonwealth under different kinds of tenure, have made contracts whereby they have not been required to pay taxes upon such property, gives the plaintiff no right to complain on constitutional grounds of the clause in its lease, wherein it has covenanted to pay taxes." With respect to the similar contention that § 12 of the 1909 act denied the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, this court said (at page 35), "Equal protection of the laws does not require that all tenants of the sovereign must hold by the same kind of tenure and be subject by contract to precisely the same liability to taxation. The variety of terms to which leases and other methods of occupancy are susceptible may secure all the

equality which the fundamental law requires of a State in dealing with its property." See also *Stoneman* v. *Boston,* 263 Mass. 255, 260. Compare *Irving Usen Co. Inc.* v. *Assessors of Boston,* 309 Mass. 544.

Here we are dealing not with property of the Commonwealth, the sovereign, but with property of the city of Boston. However, Boston Common is a property held by the city "as an agency of the government for the benefit of the public, and . . . the power of the Legislature to represent this interest is supreme." See *Lowell* v. *Boston,* 322 Mass. 709, 730-731, 735, quoting with approval *Codman* v. *Crocker,* 203 Mass. 146, 153. See *Worcester County* v. *Mayor & Aldermen of Worcester,* 116 Mass. 193, 194 (county property, not owned by the Commonwealth but held for its benefit). We think that the powers of the Legislature with respect to the taxation or exemption of the leased portion of Boston Common property are as broad as if title to the Common were in the Commonwealth, as was the case with respect to the South Boston flats considered in the *Boston Fish Market* case (224 Mass. 31).

The conclusion which we reach in the present case is supported by a recent decision of the Supreme Court of Pennsylvania. See *Pittsburgh Public Parking Authority* v. *Board of Property Assessment,* 377 Pa. 274, 282, in which it was held that a lease of a publicly owned parking facility to a private group to operate for profit, in execution of the public purpose for which the facility was obtained, did not destroy the tax exemption of the property, although a lease for commercial purposes would have done so. (See pages 282-284, and see *West View Borough Municipal Authority Appeal,* 381 Pa. 416, 421). At pages 279-280, the court points out that if the public agency in charge of the facility "instead of leasing the properties, had made these same lessees its agents to operate the properties and on exactly the same terms as provided in the leases there could be no

question but that the privilege of tax exemption would not be affected thereby . . . ." The same reasoning is, of course, applicable to the present case. See also *Phoenix* v. *Landrum & Mills Realty Co.* 71 Ariz. 382, 388;[1] *Barnes* v. *New Haven*, 140 Conn. 8; *Gohld Realty Co.* v. *Hartford*, 141 Conn. 135, 143-144; *Trenton* v. *Lenzner*, 16 N.J. 465, 471, 474. Compare *Camden Plaza Parking, Inc.* v. *Camden*, 16 N. J. 150, 154-156.

The petitioners contend that the Legislature has exercised its power to tax to the lessee the leased portion of the Common by two statutes, one applicable to Boston and the other applicable on a State wide basis.[2] By St. 1922,

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[1] Certain decisions in other States, it is contended, provide precedent for holding invalid the exemption granted in § 2A. These decisions deal with statutory provisions different from, and in general far less specific in declaring the legislative purpose (and the method of carrying it out) than, the provisions here involved. We do not feel constrained to follow these cases. See, for example, *San Francisco* v. *Ross*, 44 Cal. (2d) 52, holding (in a case involving no tax exemption) that eminent domain and public funds could not be used to acquire off-street parking space to be leased to a private operator, at least in the absence of specific provisions for regulation of the lessee's rates; *Opinion to the Governor*, 76 R. I. 365, advising that a proposed expenditure for a city yacht basin would be improper unless there should be struck out a provision for leasing the basin to private interests to operate for profit without regulation (no tax exemption was involved); *Foltz* v. *Indianapolis*, —— Ind. ——, 130 N. E. (2d) 650 (1955), holding that restrictions to be imposed in a lease of publicly owned off-street parking facilities were not sufficiently explicit to ensure their devotion to the service of the public. The legislation authorizing the acquisition and lease of the facilities was held valid because the agency in charge was under a duty to take measures in its leases to protect the public. Tax exemption was not involved.

[2] Statute 1922, c. 390, § 1, provides in part that "The lands and buildings owned by the city of Boston in fee, in trust or otherwise may, if leased for business purposes, be taxed by the assessors of taxes of said city and the taxes assessed to the lessees thereof or to their assigns in the same manner and to the same extent as if said lessees were the owners thereof in fee." A somewhat similar provision of

c. 390, § 1, land owned by the city "if leased for business purposes" is made taxable. By G. L. (Ter. Ed.) c. 59, § 3A, as appearing in St. 1951, c. 667, § 1, such leased land is made taxable "if used or occupied for other than public purposes." As indicated earlier, the respondents contend that, even under these two statutes, the leased portion of Boston Common would be exempt from property taxation as public property used for public purposes. This question it is unnecessary to decide at this time in view of the express exemption of the leased property enacted in 1948 and found in § 2A of the garage legislation.[1] We consider that exemption to be valid, for we cannot say that it was beyond the power of the Legislature to adopt it as an incident of its plan for relieving traffic congestion in Boston.

In the light of the authorities just reviewed, we are of the opinion that the explicit exemption contained in § 2A is a valid exercise of the supreme authority of the Legislature with respect to Boston Common, even though the garage is leased to a private corporation operating it for profit in its own business, and even though other leased municipal properties, whose lessees use them for their business purposes, remain taxable. The broad public purpose (see *Lowell* v. *Boston*, 322 Mass. 709, 735-738) of abating the nuisance of traffic congestion must be held to support the whole garage scheme, just as the municipal public purpose of abating nuisances has been held sufficient to justify the exercise of

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State wide application is found in G. L. (Ter. Ed.) c. 59, § 3A, as appearing in St. 1951, c. 667, § 1, which reads in part, "Real estate owned by . . . a city or town, if used or occupied for other than public purposes, shall be taxed to the lessee or lessees thereof, or their assigns, . . . in the same manner and to the same extent as if the said lessee or lessees or their assigns . . . were the owners thereof in fee, free of any trust."

[1] A decision whether, apart from § 2A, the leased Boston Common property would be taxable under St. 1922, c. 390, and G. L. (Ter. Ed.) c. 59, § 3A, will be necessary only if § 2A is repealed.

the power of eminent domain or the expenditure of public funds. *N. Ward Co.* v. *Street Commissioners of Boston*, 217 Mass. 381, 385 (garbage disposal). *Allydonn Realty Corp.* v. *Holyoke Housing Authority*, 304 Mass. 288, 294 (slum clearance). See *Tate* v. *Malden*, 334 Mass. ——, ——[1] (off-street parking, presumably to abate the nuisance of street congestion). In the *Allydonn Realty* case, just cited, the propriety of tax exemption in such a case was recognized, the court saying (at page 297, see page 291), "As soon as it is established that the primary purpose of the statute is a public purpose, the various provisions for the creation of housing authorities . . . exercise of the right of eminent domain, and exemption from taxation take their appropriate places as legitimate parts of the entire plan." It follows, therefore, in the present case, under the doctrine of the *Allydonn* case that all reasonable incidents to the Boston Common garage scheme and of achieving its public purpose, including the tax exemption provision of § 2A, must also be regarded as for a valid public purpose and "as legitimate parts of the entire plan." This court cannot say that the Legislature exceeded its powers in deciding that tax exemption was an appropriate incident of the legislative scheme.

There is nothing in *Dehydrating Process Co. of Gloucester, Inc.* v. *Gloucester*, 334 Mass. ——,[2] in *Opinion of the Justices*, 332 Mass. 769, or in *Opinion of the Justices*, 324 Mass. 724, inconsistent with the conclusion reached in the present case. In the *Gloucester* case, a pier owned by the Commonwealth was leased to a nonprofit organization and subleased by it to various lessees for the packing of fish. Although the maintenance of the pier as a facility was a proper public purpose to assist the important fishing industry, the use of the pier by the sublessees in their own businesses was held (at page 815) not to be for a public purpose. In the present

[1] Mass. Adv. Sh. (1956) 1025, 1026.

[2] Mass. Adv. Sh. (1956) 811.

case, even though Garage, Inc., is occupying the garage for its own profit in the conduct of its own business, the use of the garage by it is the very method selected by the Legislature for carrying out the primary purpose of the legislative scheme. In *Opinion of the Justices*, 332 Mass. 769, the proposed tax exemption of land in the Back Bay of Boston in the present Boston and Albany Railroad yards would have applied to land owned by private individuals and (unlike the city owned land in the present case) would not have been used to accomplish any public purpose. The opinion advised that the exemption would be improper. The proposed legislation, which this court, in *Opinion of the Justices*, 324 Mass. 274, advised would be invalid, would have exempted from taxation privately owned houses to be occupied by individual veterans and others and used by them not for any public purpose but for ordinary residential purposes.

The petitioners contend that the operation of the garage by Garage, Inc., cannot be regarded as a public use because of the failure of either the Legislature or the city to provide for the regulation and control of Garage, Inc., as, for example, in the matters of the rates to be charged and the quality of service to be rendered. They assert that some measure, at least, of public regulation and control is necessary to permit tax exemption of the garage in the hands of the lessee as property devoted to a public use. This argument is based upon language found in *Worcester* v. *Western Railroad*, 4 Met. 564, and certain cases following it. See cases collected in *Assessors of Boston* v. *Boston, Revere Beach & Lynn Railroad*, 319 Mass. 378, 381. See *Opinion of the Justices*, 334 Mass. ——, ——;[1] *Opinion of the Justices*, 324 Mass. 724, 731; *Opinion of the Justices*, 334 Mass. ——, ——, ——.[2]

[1] Mass. Adv. Sh. (1956) 905, 907-908.

[2] Mass. Adv. Sh. (1956) 789, 795, 804-805.

The *Western Railroad* case decided that the right of way of a railroad and necessary railroad structures on the right of way were not subject to taxation. Chief Justice Shaw reviewed carefully (at pages 565-566) the act incorporating the railroad and the duties imposed by law upon it. He concluded (at page 566) that from "the various provisions of the law, by which the rights and duties of the Western Rail Road Corporation are regulated, it is manifest that the establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes therefore, like a . . . highway, a public easement." He pointed out that the "only principle, on which the legislature could have authorized the taking of private property for its construction . . . is, that it was for the public use" and held (page 568) that the property was tax exempt to "the extent to which they [the railroad] are authorized to take land without the consent of the owner." It is true that, in many of the cases following the *Western Railroad* case, railroad or utility corporations, subject to potential or actual State regulation, were the owners of the property there under discussion. See, for example, *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95, 98-100; *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491, 494-497 (water company required to serve the public generally); *Connecticut Valley Street Railway* v. *Northampton*, 213 Mass. 54, 56-58 (street railway treated as taxable on property as to which it did not have power of eminent domain); *Assessors of Boston* v. *Boston, Revere Beach & Lynn Railroad*, 319 Mass. 378, 381 (ferry terminal); *Opinion of the Justices*, 334 Mass. ——, ——[1] (urban redevelopment corporations having power of eminent domain and "subject in many respects to the control of public au-

[1] Mass. Adv. Sh. (1956) 905, 907-908.

thorities" where the proposed express exemption was "to continue only so long . . . as the project continues to be operated under public regulation and for the public benefit"); *Opinion of the Justices*, 334 Mass. ——, ——, ——, ——[1] (Question 17) Massachusetts Port Authority, an instrumentality which "bears considerable analogy to a municipal corporation").

The *Western Railroad* case, and the cases following it, do not greatly rely, as supporting tax exemption of property used for public purposes, on the fact that the corporations are subject to actual or potential public regulation. At most, these cases treat public regulation of the owner or occupant of real estate as one factor to be considered in determining whether the use of the real estate is in fact public. The major consideration "is the character of the use to which the property is put, and not of the party who uses it." *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491, 496. Compare *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75, 77 (where the court construed the operations of a gas company, not required to serve the public generally, or indeed to carry on business at all, as not being for a public purpose).

We think that, under the applicable decisions, the fact that Garage, Inc., has not been subjected to public regulation of its rates or service has no tendency to indicate that the garage scheme was otherwise than for a public purpose. Consequently, this fact is not fatal to the tax exemption. Whether to include such regulation in the scheme was a matter for legislative determination. The Legislature may well have believed[2] that the competition of other garages,

[1] Mass. Adv. Sh. (1956) 789, 795, 799, 804-805.

[2] Similarly in granting tax exemption, the Legislature may reasonably have believed that without the tax exemption no corporation would undertake to construct the new garage facility on the Common at its own expense and attempt to amortize its cost within the forty

of private parking lots, and of municipally owned off-street parking facilities, would ensure reasonable prices to the public for use of the proposed garage, thus avoiding an expensive and unnecessary rate regulatory process. On this record, the garage remains potentially subject to public regulation. Nothing indicates that the Legislature has in any manner purported to bar itself from future supervision of the charges or service of the lessee of the proposed garage in carrying out the public purpose of the garage. If that becomes appropriate, doubtless provision for such regulation will be sought.

What has been said under the Constitution of the Commonwealth about the validity of the tax exemption granted by § 2A in large part also disposes of the contention that the petitioners have been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The tax exemption here granted by the Legislature is with respect to property owned by the city of Boston and used for a public purpose as expressly authorized by the Legislature. All of this was within the legislative discretion in dealing with property owned by, or held for the benefit of, the sovereign. *Boston Fish Market Corp.* v. *Boston*, 224 Mass. 31, 34-35.

By St. 1946, c. 294, § 2 (3), only a minimum rent rate was fixed. The city was entirely free to fix a rent higher than the minimum. Although the lessee, in negotiating the lease,

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years given to it before the property passed finally to the city under St. 1946, c. 294, § 2 (7). The provision for tax exemption of the leased real estate may also have been enacted with some consideration of the fact that the lessee of the garage would be subject to an excise under G. L. (Ter. Ed.) c. 63, § 32, as amended, in the measure of which the value of its leasehold interest in real estate not subject to local taxation would presumably be appropriately reflected. Compare the exemption considered in *Commissioner of Corporations & Taxation* v. *Assessors of Boston*, 321 Mass. 90, 93, et seq. See *Opinion of the Justices*, 324 Mass. 724, 731-732.

would naturally give consideration to the possibility of repeal of the tax exemption, the Legislature, in granting the exemption, would have been justified in believing that the city would normally obtain more favorable terms than if there had been no tax exemption, and that it would seek to obtain a rent high enough to compensate it for any loss of tax revenue by reason of the exemption. This would mean that the city, in another way, by proper negotiation, would receive the full equivalent of the tax, exemption from which had been granted.

Even if it be assumed that apart from § 2A the lessee of the garage would have been taxed with respect to the leased property, we perceive no denial of equal protection of the laws to any of the petitioners. The individual taxpayers have no cause to complain that this property, leased as a method of carrying out a public purpose, is not taxed while they are taxed. Separate classification for taxation or exemption of property used for a public purpose is within the legislative discretion and does not constitute an unconstitutional discrimination. "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . [I]nequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which will support it." *Carmichael* v. *Southern Coal & Coke Co.* 301 U. S. 495, 509. See *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 214-215; *Walters* v. *St. Louis*, 347 U. S. 231, 236-238. Compare *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571-572. In addition to this consideration, the corporate petitioners, if, indeed, they have any standing, apart from the ten individual peti-

tioners, to raise the question in this proceeding, cannot complain that the city, pursuant to legislative authority, leases property owned by it for a public purpose, on terms set with knowledge of, and presumably taking account of, the tax exemption. See *Boston Fish Market Corp.* v. *Boston*, 224 Mass. 31, 34-35.

There is no showing on this record that there has been any improper classification of this garage for separate treatment in the matter of taxation. There is no suggestion that the Commonwealth permits taxation of any comparable garage property owned by the city and leased for a public purpose. The fact that the tax exemption applies only to a single property does not indicate denial of equal protection of the laws, where as here a proper classification has been made. *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, 86. See *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190, 204. Compare *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571-572. For the reasons outlined, it cannot be said that exemption of this one property and one corporation has no "fair and substantial relation to the object of the legislation." See *Massachusetts General Hospital* v. *Belmont*, 238 Mass. 396, 400.

The discrimination, held to be improper in *Dehydrating Process Co. of Gloucester, Inc.* v. *Gloucester*, 334 Mass. ——, ——,[1] is wholly distinguishable. There only two sublessees of portions of a State pier, among several sublessees similarly situated, were assessed. This discrimination rested on no valid classification, as contrasted with the reasonable separate classification of the Common garage here sustained.

This petition was seasonably brought to obtain a decision on a doubtful matter of substantial civic importance. It is not an appropriate case for the award of costs of appeal. *Leonard* v. *School Committee of Springfield*, 241 Mass. 325,

[1] Mass. Adv. Sh. (1956) 811, 816.

332, and cases cited. *Howard* v. *Chicopee*, 299 Mass. 115, 123. See G. L. (Ter. Ed.) c. 261, § 13; *Carchidi* v. *Kalayjian*, 264 Mass. 230, 232.

Although there was no error in sustaining the demurrers, it will perhaps avoid future controversy if, as a matter of exercising the court's discretion under G. L. (Ter. Ed.) c. 231A, § 6, inserted by St. 1945, c. 582, § 1, a binding determination of the rights of the parties is made. Accordingly, the Superior Court, in lieu of the interlocutory decrees sustaining the demurrers and of the final decree dismissing the petition, will enter a decree declaring and determining (1) that the petitioners, and each of them, are not entitled to any affirmative or injunctive relief in equity, and (2) that, as made applicable to Garage, Inc., and its property, and, as affecting the property taxation of the petitioners, and each of them, and of their property, by the city of Boston, St. 1946, c. 294, § 2A, inserted by St. 1948, c. 654, § 1, (a) is in all respects a valid exercise of legislative power within the authority granted to the Legislature by Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth and (b) does not deprive the petitioners, or any one or more of them, of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

So ordered.

Richard Wait, (*Raymond H. Young* with him,) for the petitioners.

William H. Kerr, (*William L. Baxter*, Corporation Counsel, with him,) for the respondents city of Boston and others.

James D. St. Clair, (*Norman B. Asher* with him,) for the respondent Boston Common Garage, Inc.

THE COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

SUFFOLK, ss. No. 70629 Eq.

SAMUEL CABOT ET AL., *Petitioners,*
vs.
ASSESSORS OF BOSTON ET AL., *Respondents.*

FINAL DECREE AFTER RESCRIPT.

This cause came on to be further heard at this sitting after rescript from the Supreme Judicial Court; and thereupon, upon consideration thereof, it is DECLARED and DETERMINED:—

(1) that the petitioners, and each of them, are not entitled to any affirmative or injunctive relief in equity, and

(2) that, as made applicable to Boston Common Garage, Inc., and its property, and, as affecting the property taxation of the petitioners, and each of them, and of their property, by the City of Boston, St. 1946, c. 294, s. 2A, inserted by St. 1948, c. 654, s. 1, (a) is in all respects a valid exercise of legislative power within the authority granted to the Legislature by Part II, c. 1, s. 1, art. 4, of the Constitution of the Commonwealth and (b) does not deprive the petitioners, or any one or more of them, of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

By the Court (Rome, J.)
LEO A. REED
Assistant Clerk.

Entered December 11, 1956.

Appendix B.

STATUTE 1946, CHAPTER 294, AS AMENDED BY STATUTE 1948, CHAPTER 654, STATUTE 1951, CHAPTER 355, AND STATUTE 1955, CHAPTER 529.

AN ACT AUTHORIZING THE CITY OF BOSTON TO LEASE SPACE FOR AN UNDERGROUND GARAGE FOR THE PARKING OF MOTOR VEHICLES UNDER BOSTON COMMON, CHARLES STREET AND THE PUBLIC GARDEN, OR ANY OF SAID PLACES, IN SAID CITY, INCLUDING A TUNNEL FROM COMMONWEALTH AVENUE AT ARLINGTON STREET CONNECTED THEREWITH AND AN UNDERGROUND PASSAGEWAY FROM SAID GARAGE TO TREMONT STREET.

Be it enacted, etc., as follows:

SECTION 1. It is hereby declared that the free circulation of traffic of all kinds through the streets of the city of Boston is necessary to the health, safety, and general welfare of the public, whether residing in said city or traveling to, through or from said city in the course of lawful pursuits; that in recent years the greatly increased use by the public of motor vehicles of all kinds has caused serious traffic congestion in the streets of the city of Boston; that parking of motor vehicles in the streets of the city of Boston has contributed to this congestion to such an extent as to constitute at the present time a public nuisance; that such parking prevents the free circulation of traffic in, through, and from said city, impedes the rapid and effective fighting of fires and disposition of police forces in said city, threatens irreparable loss in valuations of city property which can no longer be readily reached by vehicular traffic, and endangers the health, safety, and welfare of the general public; that this parking nuisance is not capable of being adequately abated except by construction and maintenance of a garage under Boston Common, and that the enactment of section two of this act is hereby declared to be a public necessity.

SECTION 2. Any general or special law to the contrary notwithstanding, the City of Boston, acting through its park department with the approval of the mayor, is hereby authorized to enter into a contract with a private corporation for the construction and operation, at the expense of the corporation and without cost to the city, of a garage for motor vehicles under Boston Common in said city within the following boundaries: Bounded westerly by the easterly line of Charles street; northerly by the southerly line of Beacon street; easterly by the Soldiers and Sailors monument and the westerly perimeter of the Parkman bandstand; southerly by the Central Burying Ground; together with all necessary and convenient approaches above and below ground; provided, that on the Charles and Beacon street frontages combined there shall be an average setback of not less than ninety feet, except at the points of ingress and egress and except that the lessee and contractors employed by the lessee may be permitted to cross and recross said setback during the period of construction at such other points as may be approved by the park department; and of an underground passageway from said garage with entrance and exit at or near the corner of West and Tremont streets for the convenience of persons employed in or using said garage; and to grant a lease for such purposes to such corporation for a term of not exceeding forty years, subject, however, to the following terms and conditions:

(1) The construction contract and the plans and specifications of the project in detail shall be attached to and made part of the lease.

(2) The carrying out of the construction contract shall be guaranteed by a surety bond in the full amount of the contract, executed by a surety company authorized to do business in the commonwealth having a capital and surplus of not less than five million dollars.

(3) The lessee shall pay for the use of the rented premises a rental equivalent to not less than two per cent of its gross receipts.

(4) The contract shall require completion within not more than three years from its date, and the lease may be subject to termination in case of breach of this or any other terms and conditions of the contract or the lease.

(5) The contract shall require that the work of construction be so carried on that the gardens, lawns, trees and shrubs in the area will, after construction, remain in, or be restored to, substantially the same condition as prior to construction, except at the points of ingress and egress, and that the filling or relocation of the Public Garden pond, or any part thereof, will not be required.

(6) The lease shall not be assignable without the consent of the park department with the approval of the mayor.

(7) At the termination of the lease, the garage, passageway, and the tunnel if included in the lease, and all improvements and appurtenances connected therewith shall become the property of the city of Boston.

(8) The contract and lease may contain such further terms and conditions not inconsistent with the foregoing as the park department and the mayor may approve or require.

Said city acting as aforesaid is hereby further authorized in such contract and lease and subject to the foregoing conditions to permit the lessee to construct a two-lane traffic tunnel under said Garden, Charles street and Common from Commonwealth avenue at or near Arlington street to said garage, within boundaries substantially as follows: Beginning at a point on Commonwealth avenue at about midway between Arlington street and Berkeley street and running in an easterly direction on and under Commonwealth avenue, and under Arlington street, the Public Garden and Charles street at a location on Charles

street approximately midway between Beacon and Boylston streets to the proposed garage, so located as not to disturb the Washington monument or the bridge over the Public Garden pond; and subject to the further conditions that the fulfilment of any contract authorizing the construction of such tunnel shall be guaranteed by a surety bond executed by a surety company authorized to do business in the commonwealth having a capital and surplus of not less than ten million dollars, and that the design of the tunnel and its approaches, including the means of ventilation, shall have received the approval of the department of public works of said city. For the purpose of confirming its right to authorize the construction of such tunnel, said city, acting by its public improvement commission upon the request of its parks and recreation commission (elsewhere herein called its park department) and with the approval of its mayor, may take in its name and behalf by eminent domain under chapter seventy-nine of the General Laws any and all easements, estates and rights in the portions of land constituting Commonwealth avenue to be occupied or affected by such tunnel; provided, the lease contains a covenant secured by a surety bond in an amount satisfactory to said public improvement commission whereby said city shall be indemnified and held harmless from any and all claims, demands and actions against it for damages as a result of any and all takings under this act. Any person sustaining damage in his property by reason of any taking under this act shall be entitled to recover therefor from said city under said chapter seventy-nine.

SECTION 2A. No private corporation mentioned herein shall be assessed any tax upon any real estate, garage, underground passageway or traffic tunnel of which it is lessee hereunder or upon any structures or facilities constructed under any construction contract or lease while

such lease is in force, the provisions of any general or special law to the contrary notwithstanding.

SECTION 2B. If any provision of this chapter shall be held to be invalid, the remainder thereof shall not be affected thereby.

SECTION 2C. Any general or special law to the contrary notwithstanding, any insurance company authorized to do business within the commonwealth may invest its reserve in an amount not exceeding one fourth of one per cent of its invested assets, including cash in banks, as shown by its latest annual statement filed with the commissioner of insurance, in the bonds, notes or other obligations, whether or not primarily or substantially revenue obligations, payable solely from revenues, of the private corporation mentioned herein, when such bonds, notes or other obligations are secured by a mortgage or assignment of the leasehold authorized herein, or of all but the last day of the term thereof, and when said leasehold is for a term of not less than forty years. The provisions of sections sixty-three and sixty-five of chapter one hundred and seventy-five of the General Laws shall not be deemed to prohibit any such company from making any investment under the authority of and in compliance with this section.

SECTION 3. This act shall take effect upon its passage.

FILED
MAY 9 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 925

SAMUEL CABOT et als,
APPELLANTS,

v.

JAMES H. ALPHEN et als,
APPELLEES.

MOTION TO DISMISS
APPELLEE, BOSTON COMMON GARAGE, INC.

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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 925

SAMUEL CABOT, DOROTHY B. HALL, MARGARET P. HERRICK, ELIZABETH H. JACKSON, ELIZABETH S. PARKER, HENRY PARKMAN, GEORGE A. PARSON, CHARLES O. PENGRA, HENRY L. SHATTUCK, CONSTANCE J. WHITING, CHARLES STREET GARAGE COMPANY, INC., ELIOT STREET GARAGE COMPANY, and BRIMMER STREET GARAGE CORPORATION,

APPELLANTS,

v.

JAMES H. ALPHEN, JOHN J. CHAPMAN, and LAWRENCE J. MOORE, as they are members of the Board of Assessors of the City of Boston, THE CITY OF BOSTON, and BOSTON COMMON GARAGE, INC.,

APPELLEES.

MOTION TO DISMISS APPELLEE, BOSTON COMMON GARAGE, INC.

Appellee, Boston Common Garage, Inc. pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final decree after rescript of the Superior Court of the Com-

monwealth of Massachusetts, sitting within Suffolk County, entered on December 11, 1956, be dismissed, on the ground that the appeal does not present a substantial federal question.

Argument

The Appellee, Garage Inc. accepts the statement contained at Pages 3-6 of the jurisdictional statement filed on behalf of the Appellants.

The question sought to be presented by the Appellants is so unsubstantial as not to warrant further argument. The issue is whether the exemption of certain property owned in fee by the City of Boston to be leased by a private corporation for use as an underground garage for the purpose of abating a public nuisance denies the Appellants or any of them equal protection of the laws under the 14th Amendment to the Constitution. The General Court of Massachusetts in Stat. 1946, C. 294 as amended (jurisdictional stat. Page 33) authorized the City of Boston to enter into a contract with a private corporation for the construction and operation of a garage under the Boston Common, which land the City owned in fee. The Statute was declared to be a public necessity by reason of the fact that, in the opinion of the legislature, the parking nuisance was not capable of being abated in any other fashion. Section 2A of the Act (jurisdictional stat. Page 36) exempts the private corporation with whom the lease is executed from any real estate tax on the property of which it is the Lessee. Pursuant to the Statute Appellee, Garage Inc. executed the lease contemplated and thereby became entitled to the exemption alleged to be in conflict with the 14th Amendment.

In *Lowell* v. *Boston*, 322 Mass. 709, 735-738 the legislative purpose is reviewed and the court found as a fact that the garage under the Boston Common was part of a legislative plan designed to abate a public nuisance. The abatement of a public nuisance is clearly within the authority and responsibility of the state legislature. The fact that in implementing said purpose economic benefit is conferred upon individuals or corporation does not make the purpose public nor the Statute unconstitutional. *Everson* v. *Board of Education*, 330 U.S. 1, 6, 7. That the public purpose of the Statute as established by the legislature and as confirmed by *Lowell* v. *Boston* (supra) would support the direct construction of the garage by the City is not questioned. *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495. No substantial federal question can be presented by the method selected to achieve the admitted public purpose which involves no expenditure of public funds or commitment of borrowing power, and which supplies a return to the City in the form of rent and an addition to the public treasury from taxes other than those imposed on real estate. Mass. St. 1946 C. 474, not at issue in this case, adopts a similar approach to the solution of the parking and traffic problems of the City, providing power of eminent domain, power of resale to private operators and a real estate tax exemption. This basic approach has been upheld as a constitutional exercise of legislative authority in other states. See for example *Pittsburg Public Parking Authority* v. *Board of Property Assessment*, 377 PA 274-282 and the cases set forth in the opinion of the Supreme Court in this case at Pages 21 and 22 of the jurisdictional statement. The validity and effectiveness of this approach to promote the public welfare presents no substantial question for this court.

The Supreme Court of Massachusetts poses the issue of classification for this Court as follows (Juris. Stat. p. 29):

> "Separate classification for taxation or exemption of property used for a public purpose is within the legislative discretion and does not constitute an unconstitutional discrimination."

Every possible presumption is in favor of the validity of Stat. 1946, C. 294, S. 2 A and it may not be annulled unless it is unmistakably and palpably in excess of legislative power. *Paramount Pictures, Inc.* v. *Langer,* 306 U.S. 619, *Pierce* v. *Society of Sisters,* 268 U.S. 510. There can be no interference by the Court with the exercise by the state legislature of its inherent power to protect the public safety and welfare by abating a public nuisance, if the means employed have a substantial relation to the purposes to be accomplished. *Stephenson* v. *Binford,* 287 U.S. 251, *Missouri Pacific Railroad Co.* v. *City of Omaha,* 235 U.S. 121. The legislature of Massachusetts is free to make classifications in the application of taxing statutes and the validity of any classification depends only on whether the differences between public use and private use of property are pertinent to the subject with respect to which the classification is made, in this case the abatement of a public nuisance. *Asbury Hospital* v. *Cass County et al,* 326 U.S. 207, *Metropolitan Casualty Co.* v. *Brownell,* 294 U.S. 580.

It is clear that the Appellants, Garages do not meet the public purpose test of the class to which the garage is added by the statute because the nuisance sought to be abated was found to exist notwithstanding the operation of said garages for many years. Furthermore, the Leg-

islature has chosen to abate the nuisance by the construction of new facilities rather than by exempting from tax facilities already in existence. Even if it is assumed that the tax exemption effectively places the City of Boston in competition with the Appellants, garages, the 14th Amendment affords them no protection from such governmental competition. *Tennessee Power Co.* v. *T. V. A.*, 306 U.S. 118.

The Appellants are not assisted in their quest for a substantial federal question by the narrow assumption in their jurisdictional statement that the classification cannot stand under the 14th Amendment because only the garage under the Common is to be exempted from tax. The Appellants clearly do not overcome the burden imposed under the rule set forth in the *Carmichael* case (supra, pages 509-510)

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. • • • This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. • • •
>
> "Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. • • •

"This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." (Citations omitted).

See also the recent statement of the Court in *Walters* v. *City of St. Louis, Missouri,* 347 U.S. 231.

The Legislature was unquestionably aware of the fact that the large size and central location of the Common make it ideally suited to the solution of the traffic problem in Boston without substantial outlays of public funds or dislocation of individuals or businesses.

The fact that practically the class is limited to the corporation with whom the lease is executed does not cause the classification to run afoul of equal protection. *Independent Warehouses Inc. et al* v. *Schelle,* 331 U.S. 70. Any classification for tax purposes is permissable which has a reasonable relation to a legislative and of government reaction. *Welch* v. *Henry,* 305 U.S. 134.

The narrowest view of the classification problem which

is to classify for tax purposes under-ground parking facilities differently from all other property does not aid the Appellants. The differences in the problems involved in above and below ground facilities related to public transportation are substantial and numerous. Said differences were held to justify the exemption of a sub-surface railway line from a special franchise tax without a denial of equal protection to the surface lines. *People of State of New York ex rel; Metropolitan Railway Co.* v. *State Board of Tax Commissioners,* 199 U.S. 1. Numerous cases have held that reasonable differences in classification do not result in the denial of equal protection. See for example, *Coyne* v. *Prouty,* 289 U.S. 704 where a tax on all motor vehicles except hearses, foreign trailers and log vehicles was held to be constitutional; *Walters* v. *City of St. Louis, Missouri* (supra) where different treatment for municipal tax purposes of wage earners and self-employed people was held to be constitutional; and *Charlestown Federal Savings and Loan Association* v. *Alderson,* 324 U.S. 182 where the Supreme Court held constitutional the classification for tax purposes of notes and receivables differently from personality used in agriculture and products of agriculture including live stock, notwithstanding the fact that the state placed them in a single class for other tax purposes.

A substantial federal question cannot be found in the fact that the exemption does not attach to the property in the event that said property is conveyed by the Appellee, Garage Inc. There are two reasons for this, even if it is deemed necessary to question the discretion of the legislature in this matter. In the first place, tax exemptions are without meaning or effect unless the property is "owned" by someone. In the second place, and more important, the restriction of the exemption to the property in the hands of Appellee, Garage Inc. is consistent with the public purpose to be achieved by the statute since it

insures that the primary responsibility for the operation of the garage and the satisfaction of the obligations of the lease will always rest with the original parties to the lease.

It is respectfully submitted that the Appellants present no substantial question for the decision of this Court, and therefore, their appeal should be dismissed.

JOHN F. COGAN, JR.
Counsel for Appellee,
Boston Common Garage, Inc.

Supreme Court of the United States

October Term, 1956
No. 925

SAMUEL CABOT ET AL.,
Appellants,

vs.

JAMES H. ALPHEN ET AL.,
Appellees.

MOTION OF APPELLEES OTHER THAN BOSTON COMMON GARAGE, INC., FOR DISMISSAL OF APPEAL

MOTION TO DISMISS

The appellees in the above-entitled appeal other than Boston Common Garage, Inc., move that said appeal be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF BASIS OF MOTION

Federal Question Presented

It is plain from the Final Decree after Rescript (Juris. S., p. 32) as well as from the concluding paragraph of the opinion of the Supreme Judicial Court of Massachusetts (Juris. S., p. 31) that the question presented by the appeal at bar is much more limited in its scope than stated either in the Notice of Appeal or in the Jurisdictional Statement and is whether, considering that the appellants, insofar as they are individuals, are inhabitant property owners taxable under the general *ad valorem* property tax laws of Massachusetts and, insofar as they are corporations, are competing garage

owners likewise taxable, and considering that the appellee Boston Common Garage, Inc., is a private corporation which pursuant to Mass. St. 1946, c. 294, as amended, has contracted with the appellee City of Boston to construct a garage under Boston Common owned by said City for the purpose of abating a public nuisance without cost to said City and has leased from said City for forty years so much of Boston Common as is to be occupied by such garage and its appurtenances, Mass. St. 1946, c. 294, s. 2A (inserted by Mass. St. 1948, c. 654, s. 1), as made applicable to the appellee Garage, and its property, and, as affecting the property, taxation of the appellants, and each of them, and of their property, by the appellee City, deprives the appellants, or any one or more of them, of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by providing that the appellee Garage shall not be assessed any tax upon any real estate, garage, underground passageway or traffic tunnel of which it is lessee thereunder or upon any structures or facilities constructed under such contract or lease while such lease is in force.

A Substantial Federal Question Is Not Presented

The basic situation is this. Mass. G. L. (Ter. Ed.) c. 59, s. 3 provides that "Real estate for the purpose of taxation shall include all land within the commonwealth and all buildings and other things erected thereon or affixed thereto." In Massachusetts, assessors cannot tax a building apart from the land it occupies. *Dehydrating Process Co. of Gloucester, Inc.* v. *Gloucester*, 1956 Mass. Adv. Sh. 811, 816. In Massachusetts, taxes on real estate are to be assessed to the owner of such real estate. Mass. G. L. (Ter. Ed.) c. 59, s. 11, as most recently amended by Mass. St. 1939, c. 175. Accordingly, the garage, underground passageway, traffic tun-

nel, structures and facilities upon which the appellee Garage is not to be assessed pursuant to Mass. St. 1946, c. 294, s. 2A, together with the real estate upon which such appellee is not to be assessed pursuant to said section 2A, are all under the general tax laws of Massachusetts to be deemed real estate owned by the appellee City. In the absence of specific statutory provision, real estate owned by a municipality in Massachusetts is not liable to taxation by the assessors of such municipality. *Rossire* v. *Boston*, 4 Allen (86 Mass.) 57, 59. Compare *J. W. Perry Co.* v. *Norfolk*, 220 U. S. 472, 479. The appellants do not contest the constitutionality of this basic exemption. Specific Massachusetts statutes, however, have made exceptions to this basic exemption. Mass. G. L. (Ter. Ed.) c. 59, s. 3A, as amended by Mass. St. 1951, c. 667, s. 1, insofar as material to this case, provides for the taxation of real estate owned by or held in trust for the benefit of a city or town "if used or occupied for other than public purposes"; and Mass. St. 1922, c. 390, s. 1, enables the taxation of lands and buildings owned by the City of Boston in fee, in trust or otherwise "if leased for business purposes." The appellants take the position (Juris. S., p. 3) that if it were not for Mass. St. 1946, c. 294, s. 2A, as inserted by Mass. St. 1948, c. 654, s. 1, the property thereby exempted would be subject to taxation under either one or both of the specific statutes just mentioned. The Supreme Judicial Court of Massachusetts expressly left open whether this was so or not (Juris. S., p. 23); but however that may be, the fact of the matter is that the appellants are assailing the constitutionality of an exemption from an exception to a basic exemption the constitutionality of which they do not contest and which excludes municipally owned property from taxation under the general *ad valorem* property tax laws of Massachusetts. The crux of the situation was put

thus by the Supreme Judicial Court of Massachusetts in *Boston Fish Market Corp.* v. *Boston*, 224 Mass. 31, 34–35, when dealing with a similar exception to a comparable basic exemption:

> "The sovereignty, being the owner of its property, has a right to do with it as it will with regard to subjecting it to taxation. While property held for a public use need not be made subject to taxation in order to render taxation of the people proportional and equal, if some property so held is made liable to taxation while other such property is not, no constitutional right of the citizen is infringed. The statute, in so far as it requires taxation of some of the property of the Commonwealth leased for purposes of general business, tends toward a closer approximation to equality of taxation than if all were freed from such imposts. It is not an arbitrary and capricious subjection of some private property and exclusion of other such property from the burdens of taxation. It is a dealing by the sovereign with some of its own property in such way as to lighten to that extent the general weight of taxation . . . ."

The fundamental principles by which the federal question presented by the appeal at bar is to be determined are set forth in *Carmichael* v. *Southern Coal & Coke Co.*, 391 U. S. 495, 509–510, as follows:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. . . .
>
> "Like considerations govern exemptions from the operation of a tax imposed on the members of a class.

> A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. . . .
>
> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

In the same opinion, it was further said (p. 512): "The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise." Compare *Welch* v. *Henry*, 305 U. S. 134, 144, where the same idea is put this way: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action."

As was recognized by the Supreme Judicial Court of Massachusetts in *Lowell* v. *Boston*, 322 Mass. 709, 737, appeal dismissed 335 U.S. 849, and more briefly in the case at bar (Juris. S., p. 17), the garage here involved is "an incident in a legislative plan designed to abate a public nuisance arising from serious traffic congestion due to the

greatly increased use of motor vehicles and their parking in the public ways of the city." In short, by Mass. St. 1946, c. 294, the Legislature was seeking to have private enterprise abate a public nuisance within the City without expense to the City. More than that, the Legislature was endeavoring to increase the assets of the City by adding a garage worth many millions of dollars (see Record below, p. 7) as well as by providing a rental income. "At the termination of the lease, the garage, passageway, and the tunnel if included in the lease, and all improvements and appurtenances connected therewith shall become the property of the city of Boston." Mass. St. 1946, c. 294, s. 2, cl. (7). "The lessee shall pay for the use of the rented premises a rental equivalent to not less than two per cent of its gross receipts." Mass. St. 1946, c. 294, s. 2, cl. (2). The tax exemption afforded by Mass. St. 1946, c. 294, s. 2A, was plainly aimed at fostering this beneficent enterprise, and thus presents no substantial question of infringing the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Appellants urge that Mass. St. 1946, c. 294, s. 2A, denies equal protection of the laws because it is so phrased that the exemption it grants is limited to a single corporation and not available to a class having external standards of membership and open to newcomers. In other words, appellants say that legislation which is special in its character is necessarily within the constitutional inhibition; but as this Court said in *Missouri Pacific Railway Co.* v. *Mackey*, 127 U. S. 205, 209, "nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. . . . Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the

laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds." In *Slaughter-House Cases*, 16 Wall. 36, this Court sustained a Louisiana act incorporating a specific slaughter-house company with the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within a specifically delimited area notwithstanding an argument that it denied equal protection of the laws. Compare *Sanger* v. *Bridgeport*, 124 Conn. 183, 189, where it is said: "The State may grant privileges to specified individuals without violating any constitutional principle in cases where sufficient reason exists." In short, what the equal protection clause means is that "the rights of all persons must rest upon the same rule under similar circumstances". *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37. *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U. S. 459, 461. Circumstances cannot be differentiated unless the difference or differences bear a reasonable and just relation to the purpose of the legislation; but if there is such a difference or differences, albeit the legislation relates to a single person, the rights of all persons similarly situated rest upon the same rule. *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, 86. To provide for newcomers would be superfluous where, as here, there could be no newcomer in the absence of another statute like Mass. St. 1946, c. 294, which, were it not to deny equal protection, would have to grant similar tax exemption to the newcomer; but no reason appears why that should militate against the existing act.

The appellants (Jurisdictional Statement, p. 9) assert that the Supreme Judicial Court of Massachusetts incorrectly stated the terms of the statute here involved when it said: "The tax exemption here granted by the Legislature is with respect to property owned by the city of Boston and used

for a public purpose as expressly authorized by the Legislature." This does not say that the tax exemption is "of" property, as appellants' counsel appears to think, but "with respect to" property, which is in full accord with the words of the statute that "No private corporation mentioned herein shall be assessed any tax *upon* any real estate, garage . . ." (Italics supplied.) The failure of the statute to extend the exemption to assignees of the original lessee certainly cannot be said to deny the appellants, or any of them, of the equal protection of the laws.

The corporate appellants (Juris. S., p. 8) also complain because they are excluded from the exemption although their existing garages contribute in the same fashion to the relief of traffic congestion. The short answer to this is that the public nuisance which the proposed garage is to abate exists despite their garages; and the appellants are not proposing to construct a garage to abate it.

Conclusion

The motion of the appellees other than Boston Common Garage, Inc., for the dismissal of the appeal at bar should be granted, and the appeal dismissed.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 925.

SAMUEL CABOT *et ali.*, Appellants,

v.

JAMES H. ALPHEN *et als.*, Appellees.

BRIEF FOR APPELLANTS IN REPLY TO MOTION FOR DISMISSAL OF APPEAL.

This brief is submitted by the appellants in opposition to the motions of all appellees to dismiss, all pursuant to Rule 16. Motions to dismiss were served on May 8, 1957.

The arguments submitted by appellees in the two memoranda in support of the motions are principally concerned in the endeavor to establish that the "classification" of Boston Common Garage, Inc., constituted a reasonable classification. They do not meet the position which we set forth in our Jurisdictional Statement that St. 1948, c. 654, did not create any classification at all.

Both place reliance on the opinion in *Independent Warehouses, Inc.*, v. *Scheele*, 331 U.S. 70, which held that a permissible classification was not to be condemned merely because in the particular case before the Court there was only one person who had qualified for membership in the class. That case was concerned not with a property tax such as we have here, but with a "license or franchise tax for the privilege of conducting that business in the state"

(331 U.S. at 75). The statute there under consideration provided perfectly definite external standards to define the class. In the memorandum submitted by Garage, Inc., the case is cited to support the proposition (at page 6) that

> "The fact that *practically* the class is limited to the corporation with whom the lease is executed does not cause the classification to run afoul of equal protection." (Emphasis supplied.)

The case does support that statement as an abstract proposition, but the statement is not applicable to the case at bar, since here the "class" was not limited *practically* to Garage, Inc., but rather by the very wording of St. 1948, c. 654.

This is clearly recognized in the other memorandum in which Mr. Kerr states (at page 7) after citing the *Scheele* case:

> "To provide for new comers could be superfluous where, as here, there could be no new comer in the absence of another statute like Mass. St. 1946, c. 294, which, were it not to deny equal protection, would have to grant similar tax exemption to the new comer."

This specifically recognizes that the existing legislation does not define a class. It admits that new legislation would be necessary with respect to any other garage. It is further admitted by all appellees that the statute does not extend, even with respect to the very garage in question, the exemption to any successor in interest and operation to Garage, Inc., whether through assignment, foreclosure, or otherwise. It follows, then, that the challenged exemption provides no classification at all, but only a spe-

cial benefit to Garage, Inc., offensive to the rights of all other taxpayers.

While Mr. Kerr admits that the statute does not speak in class terms, he appears to contend that a class composed of garages erected on property leased from the City of Boston would be proper. Appellants submit that no such classification could be considered "reasonable" with respect to the rights of the appellant garages. Where, as here, the leases treat rent and taxes as distinct matters, and place the burden of taxation on the lessee, a proper classification would have to include all garages, or at least all garages meeting specified standards and located in a defined congested area. The only possible legislative purpose advanced by any appellee is the relief of traffic congestion. Yet appellant garages, located in the immediate area, of necessity would continue to contribute to the abatement of a traffic nuisance, insofar as any garage would so do. Exclusion of appellant garages from the class would therefore be arbitrary, capricious, and in clear contravention of their constitutional rights.

If there were a class, exclusion of the appellant garages would make the class arbitrary beyond possible justice; but the simple fact is that there is no class at all, so that the exemption infringes the constitutional rights of all taxpayers within the jurisdiction, including your appellants. None of the appellees has met this contention.

Respectfully submitted,

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